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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WILLIAM TAYLOR

Plaintiff,

v.

CITY OF BURBANK and DOES 1 through 100, inclusive,

Defendants..

Case No. BC 422252
Assigned to the Hon. John Shepard Wiley, Jr., Department 50

DEFENDANT CITY OF BURBANK'S OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY'S FEES; MEMORANDUM OF POINTS AND AUTHORITIES

[Declarations of Ronald F. Frank and Robert J. Tyson filed concurrently]

DATE: July 9, 2012
TIME: 8:30 a.m.
DEPT.: "50"

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I. INTRODUCTION

Following a favorable verdict at trial, plaintiff's counsel each request an award of their attorneys' fees which, when combined with their excessive rates, questionable time keeping, and over inclusiveness, and an unjustified multiplier, would outstrip the jury award by many hundreds of thousands of dollars. Naturally, such a request invites the Court to come in and pare the request significantly to an award of reasonable fees for only those actions reasonably necessary to the conduct of the litigation but only on the claim for which fees are awardable.

II. ALL FOUR BILLING STATEMENTS SUBMITTED BY PLAINTIFF CONTAIN VAGUE ENTRIES AND BLOCK BILLING WHICH IS CLEAR EVIDENCE OF BILL PADDING

As the moving party, plaintiff counsel "bear[s] the burden of establishing entitlement and documenting appropriate hours expended and hourly rates...[and] [t]he court may also properly reduce compensation on account of any failure to maintain appropriate time records." *Christian Research Institute v. William Alnor* (2008) 93 Cal.App.4th 1315, 1320 *quoting Computer Xpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020. Inclusion of vague billing entries that do not explain the work is indicative of bill padding in an attempt to boost recovery. The law here is clear: "'padding' in the form of inefficient or duplicative efforts is not subject to compensation." *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1132 (emphasis added).

Plaintiff has the "burden of showing that the fees incurred were 'allowable,' were 'reasonably necessary to the conduct of the litigation' and were 'reasonable in amount.' " *Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 271; *Levy v. Toyota Motor Sales, USA, Inc.* (1992) 4 Cal.App.4th 807, 816; *Martino v. Deneui* (1986) 182 Cal.App.3d 553, 559 (evidence of nature and value of the services rendered required); *Crespin v. Shewry* (2004) 125 Cal.App.4th 259, 271 ("must be based on detailed time records"); *PLCM Group, Inc. v. Deexler* (2000) 22 Cal.4th 1084, 1096.

The Supreme Court held in *Ketchum v. Moses* (2001) 24 Cal.4th 1122 that "[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." *Ketchum,* at 1137 *quoting Serrano v. Unruh* (1982) 32 Cal.3d 621, 635 (emphasis added). In the face of such overreach, vagueness, and Block Billing practices

as described, the Court is empowered to either deny recovery altogether or to reduce the amount requested with or without use of a negative multiplier.

A. PLAINTIFF COUNSELS' TELEPHONE AND CORRESPONDENCE ENTRIES ARE VAGUE AND INCOMPLETE PRECLUDING EVALUATION BY THIS COURT

All four of the billing statements submitted are riddled with entries that prevent meaningful consideration by this Court because of the failure to include the nature of frequent, general tasks such as telephone calls, correspondence, research, and law and motion work. The consequence of this failure of description is the same as that described in *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 689 in which the court reversed the trial court fee award because "render it virtually impossible to break down hours on a task-by-task basis."

Plaintiff's attorney Smith submitted time records that include 5.3 hours of time billed for phone calls that appear on almost every page of the time records to various persons without explaining the subject of the call. (Frank Decl., Ex. A). Further, Smith bills a minimum of 0.2 for a phone call, even though there were shorter calls. (Frank Decl., Ex. A, at ¶5) This is highly suggestive of "padding" by overcharging for short phone calls.

Attorney Smith's time records also includes 29.3 hours of time billed for letter or email drafting, with no description of the subject of the correspondence. (Frank Decl., Ex. B, at ¶6). These time records render it impossible to determine if the work is duplicative of other entries, reasonably spent, or even if it concerned subjects for which fees are not recoverable.

Attorney Brizzolara's submitted time records includes 93.01 hours of time billed for the receipt, review and analysis of correspondence or memoranda *from Plaintiff.* (Frank Decl., at ¶7). In total, Brizzolara claims the task of reviewing and analyzing correspondence or memos *from* his *client* took him an average of 2.3 hours to perform. (Id., Ex. C, at ¶7). While it might be reasonable to claim 2.3 hours to *prepare* one particularly complex piece of correspondence *to* one's client, it is facially unreasonable to claim an average of 2.3 to review/analyze every correspondence *from* one's client. (Id., at ¶7). Defense counsel has never before seen an attorney claim time of such magnitude for this type of task. (Decl. of Frank at ¶7). Brizzolara's claimed time for reviewing correspondence from his client is highly suggestive of bill padding and merits

a significant reduction, if not outright denial, of his attorneys' fees request.

A "...fee application must also contain sufficiently detailed information about the hours logged and the work done." *National Association of Concerned Veterans, et al. v. Secretary of Defense, et al.* (1982) 675 F.2d 1319, 1327. A fee can be denied in its entirety on the ground of the request being unreasonable and inadequately documented. *Serrano v. Unruh* (1982) 32 Cal.3d 621, 635. The hours described above for plaintiff's counsels' vague and uncertain entries should either denied entirely, or reduced by 50%.

B. PLAINTIFF COUNSELS' BILLING STATEMENTS IMPROPERLY CONTAIN BLOCK BILLING

Plaintiffs counsels' time records also contains Block Billing-- multiple tasks are lumped into one entry. Block Billing is frowned upon because it "...obscure[s] the nature...of the work claimed, and the potential for abuse is high". *Christian Research Institute v. William Alnor* (2008) 93 Cal.App.4th 1315, 1324-1325. In *Lahiri v. Universal Music & Video Distribution Corp.* (9th Cir. 2010) 606 F.3d 1216 the Ninth Circuit upheld a trial court's reduction of claimed hours by 80% and 30% respectively because of Block Billing, citing the finding in the California State Bar Committee on Mandatory Fee Arbitration Report that Block Billing may increase time by 20 to 30 percent. *Lahiri v. Universal Music & Video Distribution Corp.* (9th Cir. 2010) 606 F.3d 1216.

Attorney Smith's time records include many entries where multiple tasks are included under one heading. (Frank Decl., Ex. D) In total, Smith's time records include 125 hours of Block Billing over 23 separate entries. (Id., Ex. D). Attorney Smith's paralegal, Selma I. Francia, submitted her own declaration and time records, seeking recompense for 118.5 hours at the rate of $200.00 for a total amount of $23,700.00. Block Billing accounts for 60 time entries, 81.3 hours, and 69% of all hours that Ms. Francia claims. (Frank Decl., Ex. E). The Court should either deny recovery of these Block Billed hours in their entirety, or reduce them by 50%.

C. PLAINTIFF COUNSELS' BILLING STATEMENTS INCLUDE TIME FOR CLERICAL WORK

Quite simply, secretarial time is not compensable; it is part of an attorney's overhead. *See Yeager v. Bowlin* (E.D.Cal. June 7, 2010) No. 2:08-102-WBS-JFM, 2010 WL 2303273, at *8. Including hours for clerical work in a bill is grounds for denying a fee altogether. *Vocca v.*

Playboy Hotel of Chicago, Inc. (N.D.Il1. 1981) 519 F.Supp. 900, 901-902.

Plaintiff counsel also includes entries that are clerical or secretarial in nature such as the preparation of hours for the Motion, formatting, spell checking, and the taking of dictations. Paralegal Francia's time records contain far and away the most time spent performing clerical work, which is not surprising considering she doubles as Smith's legal secretary. In total, Francia spent 42 hours performing clerical work over 61 entries. (Frank Decl., Ex. F) One such entry is described as "Take dictation from G. Smith revising 8/26/09 letter to Ericka Reinke of the City of Burbank re interview" and is attributed to 8/27/09. (Id.). Secretaries take dictation, not paralegals, and plaintiff is not entitled to fees for secretarial work.

Attorney Smith included clerical tasks in his time records with examples that include "Prepare documents for delivery to Δ" and "Prepare hours for motion for attorneys' fees." In his declaration, Smith confirmed that the time records he submitted to support his portion of the fee request "have been reconstructed from the file, attorney's notes, pleadings, calendars and dates logged by computer..." (Decl. of Smith in support of Motion at p. 4, ¶5). Smith cites no authority for the proposition that a defendant must pay for the time it takes plaintiff's counsel to reconstruct time records that he failed to record contemporaneously. The 15.2 hours he spent on this task described as "Prepare hours for motion for attorneys' fees" should not be included in an award.

III. PLAINTIFF COUNSEL HAVE NOT MET THEIR BURDENT FOR RECOVERY OF TIME SPENT PRIOR TO THE FILING OF THE COMPLAINT

An attorney attempting to recover fees for hours spent before the filing of a complaint "...**bear[s] a heavier burden** of demonstrating how that activity contributed to the success of the litigation." *Hogar v. Community Development Comm. of the City of Escondido* (2007) 157 Cal.App.4th 1358, 1370 (emphasis added). Plaintff's counsel failed to even attempt to meet this burden here. All 47.1 hours that Smith spent on this case before beginning to prepare the Complaint on September 18, 2009 (Motion, Smith Decl., Ex. 2), should be denied.

IV. PLAINTIFF'S COUNSEL SEEK INFLATED HOURLY RATES

Plaintiff counsel is claiming a range of hourly rates for each timekeeper. Specifically, attorneys Smith and Brizzolara claims an hourly rate of $600, attorney Benedon claims a rate of $525, and they seek of $200 per hour for the paralegal services of Francia. These requested rate

are nearly double the rates paid for attorneys and paralegals by the City (Frank Decl., ¶12) Moreover, as Plaintiff's counsel also seek a multiplier of 2.0, they are essentially seeking to recover 3- 4 times defense counsel's hourly rate. This request is unreasonable and excessive.

Attorney Smith acknowledges that his requested hourly rate of $600.00 an hour, has only been awarded once. (Motion, Smith Decl., p. 4:3-6). No other court has awarded Smith fees in excess of $500.00 an hour, including several other recent awards. (Motion at p. 8:11-13; Smith Decl., Exs 1-2). The City suggests that this Court should award any attorneys' fees for Smith and Brizzolara, and Benedon at a rate no higher than $500 per hour. Moreover, $200 per hour for a paralegal is overreaching. Ms. Francia's rate should be reduced to $150 per hour.

V. PLAINTIFF'S FEE REQUEST IS EXCESSIVE BECAUSE IT FAILS TO APPORTION TIME SPENT BETWEEN CLAIMS

"When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover ***only on the statutory cause of action***." *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 157, 50 Cal.Rptr.3d 273 (emphasis added). According to that case, fees need not be apportioned only when the fee claims and the non-fee claims "are so interrelated that ***it would have been impossible to separate them*** ...." *Id.* (emphasis added). While acknowledging that he is not entitled to recover fees for his Labor Code claim, Plaintiff makes no *meaningful* attempt to apportion it from his FEHA claim, disingenuously stating without analysis that only 2% of trial time was allocable to the Labor Code claim. (Id., at p. 4:2-4).

Plaintiff's Labor Code claim centered around his contention that the City had violated the law in handling certain burglaries and other internal investigations. This issue was heavily litigated in the discovery phase of the case. Indeed, the entire issue about the *Pitchess* Motions for Rosoff and Jette, discussed in detail below, fell into this category, so that all of the preparation and litigation of those motions should not be recoverable at all. Moreover, these issues were a significant subject at trial, including through the testimony of Taylor and Lt. Rosoff.

Indeed, just on this one small aspect of the Labor Code claims—getting the Jette and

Rosoff investigation, Smith's vague billing reveal at least 48.7 hours[1] of time which is not recoverable. Brizzolara spent 97.3 hours[2] on this one non-recoverable issue. Attorney Benedon spent approximately 78 hours[3] on this issue, covered by the first of the two writs. Of course, a much large portion of time was spent on these issues in both trial and pre-trial efforts which is not as easily culled out of plaintiff's vague time records. None of the attorneys fees for these hours should be awarded under FEHA.

As a result of plaintiff's counsel's failure to clearly allocate their time their time records between their FEHA and Labor Code claims, City suggests that Mr. Brizzolara's, Mr. Smith's and Ms. Francia's hours each be reduced by 33%. This figure acknowledges some overlap between the claims, but fairly allots for the significant time spent on the Labor Code claims as well. Mr. Benedon's time should be reduced by 78 hours spent on the first writ.

VI. THE FEE APPLICATION IS EXCESSIVE BECAUSE PLAINTIFF'S ATTORNEYS UNNECESSARILY PROTRACTED THIS LITIGATION

Plaintiff's fee application is also excessive because his attorneys unnecessarily protracted this litigation and needlessly increased the costs to both parties in two particular contexts.

A. PLAINTIFF'S REFUSAL TO FILE TWO PITCHES MOTIONS UNDER SEAL ONLY TO CONCEDE THE NEED TO DO SO EIGHT MONTHS LATER JUSTIFIES REDUCTION OF THE LODESTAR FIGURES

Plaintiff and his counsel prepared Pitchess motions seeking disclosure of certain internal affairs investigations, one concerning Lt. Rosoff, another concerning Lt. Jette, to which Plaintiff had been privy will with the Burbank Police Department. He served the Motions on August 25, 2010. Defense Counsel Kristin Pelletier realized that the motions themselves would publicly reveal the contents of those confidential investigations as recalled by Plaintiff, thus violating the

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[1] See Motion, Smith Decl., Ex. 2: 7/12/10 (4.5 hrs) 8/25/10- 10/14/10 (14.0 hrs), 11/5/10 (6.0 hrs), 12/6/10 (4.0 hrs), 12/23/10 (0.2 hrs) 1/19/11 (4.0 hrs), 4/6/11 (4.0 hrs), 4/13/11 (4.0 hrs), 5/31/11 (4.0 hrs), 7/5/11 (4.0 hrs).

[2] See Motion, Brizzolara Decl., Ex. A: Entries Nos. 181-187 (20.8 hrs), 192-208 (20.0 hrs), Nos. 220- 233 (20.1 hrs), No. 252 (3.5 hrs), No. 259 (3.4 hrs), Nos. 264-270 (4.1 hrs), Nos. 279-289 (2.0 hrs), and Nos. 293-303 (2.8 hrs), Nos. 321-324 (3.5 hrs), Nos. 336-341 (13.0 hrs), Nos. 350-353 (4.1 hrs).

[3] See Motion, Benedon Decl., Ex. 2: All entries 1/20/11- 2/3/11 (Totaling 64.2 hours), 2/7/11 (1.00 hours re first return), and half of the time jointly spent on both writs 2/10/11- 5/25/11: (Reducing 27.55 to 13.8).

officer's right to confidentiality as guaranteed in Penal Code § 832.7 without having first having gone through the process required by Evidence Code §§ 1043-1045. Ms. Pelletier contacted Mr. Smith immediately. Mr. Smith would not agree to have the documents filed under seal, but he agreed to hold off filing them long enough to allow the City to seek an ex parte order requiring him to file them under seal. [Tyson Decl., ¶3, Ex. A (Ex Parte/Pelletier Decl., ¶ 2), p. 7:7-21.]

Defendant city brought an ex parte application seeking to require that the records be filed under seal on August 27, 2010. Plaintiff appeared and opposed, and so began an unnecessarily long, drawn-out process in which plaintiff opposed filing his motion under seal revealing the contents of confidential police personnel records. [See Tyson Decl., ¶4, Ex. B (Writ Petition) pp. 6-12.] The initial hearing was continued to August 30, 2010, at which time Plaintiff filed an opposition. The Court initially denied the City's request but agreed to allow Jette and Rosoff time to file a noticed motion for protective order pursuant to *Evidence Code* §1045(d), which they did on September 22, 2010. This required an ex parte application to lodge plaintiff's served-Pitchess motions under seal so the Court could see the confidential information what would be revealed, which Plaintiff's counsel appeared and opposed. Plaintiff filed an opposition to Jette and Rosoff's motion on October 5, 2010, and Jette and Rosoff filed a reply on October 13, 2010.

The Court continued the hearing on the officer's motion from October to December 6, 2010, and when counsel appeared on that date, continued it again to December 15, 2010. On December 15, 2010, the Respondent Court denied Jette's and Rosoff's motion. On December 30, 2010, Defendant city and Jette and Rosoff filed a petition for writ with the Court of Appeal. On January 12, 2011, the Court of Appeal issued an Order to Show Cause and set the matter for oral argument. Plaintiff filed a return which continued to oppose sealing the records [Tyson Decl., ¶6 Ex. C.] Nevertheless, during oral argument before the Court of Appeal, Plaintiff's appellate counsel immediately conceded that Plaintiff would agree to file the motions under seal [Tyson Decl., ¶6], as had been requested by Defendant city some *eight months earlier*. The Court issued its opinion on May 23, 2011, requiring the motions be filed under seal.

Plaintiff cannot meet his burden in showing that his protected resistance to filing the Jette and Rosoff motions under seal, and extra time it necessitated was '*reasonably necessary* to the

conduct of the litigation' and were 'reasonable in amount.' " *Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 271. As such, the time spent in protracting this issue should not be awarded.[4] As such, attorney Smith's 36.2 hours[5], Brizzolara's 55.9 hours[6], Benedon's 78 hours in unnecessarily protracting this issue should not be awarded.

B. PLAINTIFF'S FILING OF PITCHESS MOTIONS FOR BOBB AND YANG WAS PATENTLY IMPROPER

On December 1, 2010, Plaintiff filed a purported Pitchess Motion seeking to gain access to irrelevant attorney-client privileged communications between the City and two outside attorneys—Merrick Bobb and Debra Wong Yang – who provided legal advice to the City on issues not related to this action. A Pitchess Motion is not a proper vehicle for seeking attorney-client information, and Mr. Smith had earlier represented to the Court that the work of Mr. Bobb and Ms. Yang "don't really have anything to do with our case." [See Tyson Decl., ¶7, Ex. D (Ex. A thereto, p. 9:3-6).] Plaintiff sought to continue the hearing. The motion and request for continuance were both denied. Smith spent at least 4 hours on this Motion, and Brizzolara spent at least 4.2 hours[7] thereon, for which attorneys' fees should not be awarded.

VII. THE COURT SHOULD APPLY A NEGATIVE MULTIPLIER TO THE LODESTAR AMOUNT, OR NONE AT ALL

A. PLAINTIFF'S REQUEST FOR A MULTIPLIER IS WITHOUT A BASIS IN LAW OR LOGIC

In his Motion, Plaintiff seeks a multiplier of 2.0 to be applied to the $876,532,5 in fees requested by plaintiff's counsel. Plaintiff, however, is not entitled to a multiplier here.

Plaintiff is not entitled to a multiplier in addition to a lodestar because the factors for determining the multiplier and the lodestar are ***duplicative here***. For example, in *Flannery v.*

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[4] All of this time should also not be awarded because it is the basis of the Labor Code claim as discussed above in Section __. However, if the Court felt it could be awarded, the attorney time spent in protracting the issue should not be awarded.

[5] Motion, Smith Decl., Ex. 2: All entries 8/25/10- 10/14/10 (14.0 hrs), 11/5/10 (6.0 hrs), 12/6/10 (4.0 hrs), 12/23/10 (0.2 hrs) 1/19/11 (4.0 hrs), 4/6/11 (4.0 hrs), and 4/13/11 (4.0 hrs).

[6] Motion, Brizzolara Decl., Ex. A: Entries Nos. 192-208 (20.0 hrs), Nos. 220- 233 (20.1 hrs), No. 252 (3.5 hrs), No. 259 (3.4 hrs), Nos. 264-270 (4.1 hrs), Nos. 279-289 (2.0 hrs), and Nos. 293-303 (2.8 hrs).

[7] Motion, Smith Decl., Ex. 2 (1/21/11 entry), Brizzolara Decl., Ex. A (Entries Nos. 248-249, and 271-274).

California Highway Patrol, 61 Cal.App.4th 629, 71 Cal.Rptr.2d 632 (1998), the court rejected the plaintiff's request for a multiplier, stating that such a request amounts to an unreasonable windfall for the plaintiff in light of the factors with which the plaintiff there relied for a multiplier:

> *The [trial] court's order also reveals that some of the factors upon which it relied to calculate the reasonable hourly rate component of the lodestar, i.e., the skill and experience of the attorneys and the nature of the work performed,* ***were duplicative*** *of the factors that it cited to justify enhancing the lodestar. When the trial court explicitly takes such factors into account in setting the lodestar, there is no logical basis for using them again to enhance or apply a multiplier to the award. As the prevailing party, plaintiff was entitled only to 'reasonable attorney fees' (Gov. Code, § 12965, subd. (b)),* ***not reasonable fees plus a windfall****. We do not understand Serrano III and its progeny to countenance such express double counting, which can only result in an unreasonable fee.*

Flannery, supra, 61 Cal.App.4th at 647; *see also City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638 (1992) (same).

Like the plaintiff in *Flannery,* Plaintiff raises the contingent nature of his attorneys' representation as his justification for the lodestar calculation ***and*** for applying a multiplier. (Compare Plaintiff's Motion at p. 7:22-25 [justifying lodestar calculation on the need for plaintiff's bar to have sufficient "resources to engage in complex litigation on a contingency basis" requires "financial incentives"] and p. 11:13-17 [justifying the multiplier because "the court must adjust the resulting fee to fulfill the statutory purpose of bringing "the 'financial incentives for attorneys enforcing important constitutional rights…into line with the incentives they have to undertake claims for which they are paid on a fee-for-services basis"].) By doing so, Plaintiff has once again revealed that he is not seeking "reasonable attorneys' fees;" he is seeking a windfall through an excessive and unreasonably inflated request for attorneys' fees in direct contravention of controlling authority. The Multiplier should be denied.

B. USE OF A POSITIVE MULTIPLIER IS CLEARLY NOT APPROPRIATE FOR ATTORNEY BENEDON

The gravamen of Plaintiff's theory of entitlement to a positive multiplier is the risk of non-payment in contingency fee cases. Further, the contingent nature of a fee agreement is typically the first among relevant factors on which courts rely when awarding a positive multiplier. In this case, attorney Benedon served "[a]s counsel responsible for representing Plaintiff in the writ proceedings in the Court of Appeal." (Decl. of Benedon in support of

Plaintiff's Motion at p. 3:9-10).[8] In relevant part, attorney Benedon declared:

- "Our Firm represented Plaintiff on a contingency fee basis." (Id. at p. 3:11).
- "*All costs* for research, photocopies, facsimiles, parking, etc. *were also charged on a contingency fee basis*." (*Id.* at p. 3:11-12).
- "Benedon & Serlin's 'lodestar' fee in this case is therefore in the amount of $62, 215.50. This figure should be enhanced by a multiplier of 2.0, to reflect the contingent nature of the action..." (*Id.* at p. 4:4-6).

However, attorney Benedon's time records clearly establish that Benedon & Serlin did not provide "all costs for research, photocopies, facsimiles, parking, etc.," to Plaintiff "on a contingency fee basis" as Benedon declares. (Motion, Benedon Decl., at p. 3:11-12). His invoice contains the following entries:

- "6/6/2011 "*Payment* – thank you. *Check No. 7847* ($880.47)"
- "Total payments and *adjustments* ($880.47)"(Motion, Benedon Dec., Ex. 2, p. 3 (emphasis added)

The 6/6/2011 line item indicating payment received in the amount of $880.47 is entirely consistent with regular and customary bookkeeping practices of law firms that provide services on a payment-for-services basis (Frank Decl., at ¶13) and largely speaks for itself. To state the obvious, the "payment received" entry shows that Benedon & Serlin received payment for $880.47 of the $1,067.31 in total costs incurred, or 82% of total costs. Charging and receiving payment for costs, including photocopying and parking, is in direct tension with Benedon's sworn statement in his declaration that "*All costs* for research, *photocopies*, facsimiles, *parking*, etc. were also *charged on a contingency fee basis*." Whatever the actual terms of Plaintiff's fee agreement with Benedon and Serlin, receiving payment for 82% of total costs cannot be fairly characterized as "contingent." This discrepancy calls into serious doubt the claimed contingent nature of Benedon & Serlin's fee agreement for professional services.

Importantly, the degree of specificity of the "payment received" entry wherein a *specific*

[8] Hereinafter, the declarations of attorneys Benedon, Smith, and Brizzolora are referred to as "Decl. of Benedon," "Decl. of Smith," and "Decl. of Brizzolora, respectively."

check number is identified as the source of payment and the payment amount is a peculiar rather than round number, are strong indicia of Benedon & Serlin's actual receipt of payment in the amount of $880.47 representing 82% of all costs incurred on Plaintiff's behalf. The only other alternative explanation available to Plaintiff concerning this discrepancy is to acknowledge the inaccuracy of his *sworn statement* declaring that all costs were also provided on a contingency fee basis. In either case, the Court would more than justified in rejecting the requested multiplier, applying a negative multiplier to their remaining valid lodestar amount.

Defendant respectfully requests that the Court consider using the same criteria suggested above for disposition of the fee request of Benedon to all three of Plaintiff's attorneys because of this overlap that confirms Smith and Brizzolara both knew of should have known that Benedon did not provide, as claimed, all costs on a contingency fee basis.

C. THE APPLICATION OF A NEGATIVE MULTIPLIER TO THE LODESTAR AMOUNT IS APPROPRIATE HERE

Case law is clear that a multiplier can be applied to either reduce or enhance the lodestar, depending on the facts of the particular case *See* Serrano v. Priest (1977) 20 Cal.3d 25, 48 (*Serrano III*); *Thayer, supra,* 92 Cal.App.4th at p. 833; *Ketchum III, supra,* 24 Cal.4th at p. 1134 and 1138. The factors to be considered in determining whether the lodestar should be reduced or enhanced include: "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for bringing lawsuits of the character involved; [and] (6) the fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed..." *Serrano III, supra,* 20 Cal.3d at p. 49. As discussed below, the application of those factors to the facts of this case weigh in favor of a reduction in the lodestar, not an enhancement.

Thayer, supra, 92, Cal.App.4th 819, is instructive on the application of the *Serrano III* factors to the particular facts of a case. There, banking customers consolidated five class actions

against Wells Fargo arising out of the fact that Wells Fargo sent letters notifying those customers that their bank accounts were subject to monthly service fees *Id.* at p. 823. The consolidated case resulted in a settlement agreement between the bank and its customers and the trial court awarded attorneys' fees to plaintiffs' counsels on the basis of an enhanced loadstar *Id.* The court of appeal reversed *Id.* at p. 846. Considering the factors laid out in *Serrano III,* as described above, the appellate court noted that the fourth, fifth, and sixth factors did not apply to the case under consideration *Id.* at p. 834. With regard to the first factor, the court found that "neither the problem [presented in the litigation] nor the remedy was so complex as to seriously tax the ingenuity or resources of any of the attorneys involved" *Id.* at p. 837. Moreover, the court found that counsel sought compensation for hours that duplicated the work of other counsels in the matter *Id.* at p. 841-843. The appellate court reversed the judgment of the trial court holding that the lodestar should be reduced, rather than enhanced *Id.* at 845.

With regard the case at bar, factor 1 also weighs in favor of a reduction of the lodestar, rather than enhancement. Plaintiff asserts that "all counsel have a certain amount of expertise in litigating employment cases against public entities" as among the facts and circumstances that justify a positive multiplier of 2.0. (Motion at p. 13:7-9). The same factor cannot be used to justify both the lodestar amount and an enhancement. *See* Thayer, *supra,* 92 Cal.App.4th at p. 838; *Ketchum III, supra,* 24 Cal.4th at p. 1139; and *Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal. App. 4th 603, 623. The declarations submitted by Plaintiff's attorneys in support of the requested hourly rate clearly demonstrates that the listed experience of all attorneys is the principal basis for the requested high rates.

In addition, the first factor considers the skill used to present the questions involved, considering the novelty or complexity of the question. "'[H]igh-quality work may produce greater results in less time than would work of average quality, thus justifying a multiplier"' *Thayer, supra,* 92 Cal.App.4th at p. 838 (citing Pearl, Cal.Attorney Fee Awards (Cont.Ed.Bar 2d ed. 1998). The case was a garden-variety employment case involving retaliation in the workplace which has been litigated many times and on which the law is well-established. (Frank Decl., at ¶14). Plaintiff's attorneys performed their jobs, but did not present the type of "exceptional

representation... [that] far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation" *Ketchum III, supra,* 24 Cal.4th at p. 1139 that would justify a lodestar enhancement. (Frank Decl., ¶14). Thus, factor 1 militates in favor of a *negative* multiplier.

Factors 2 and 4 likewise support the application of a negative multiplier in this case. Similar to the facts in *Serrano III, supra,* in which a reduction to the lodestar was also deemed appropriate, this case is against a public entity and the responsibility to pay a fee award would ultimately fall upon the taxpayers. Plaintiff's counsel's billing records of all attorneys indicate sufficient remaining time in the day to perform work in connection with many other cases.

A close examination of factor 3 reveals that, at a minimum, the use of a positive multiplier is not appropriate in this case. Plaintiff argues that he is entitled to a multiplier because of the contingent risk of the litigation. The court in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1175, a case involving a request for attorneys' fees and a multiplier based on the FEHA, reconciled the *Serano* cases and discussed the "contingency" factor of the multiplier analysis:

> *"Looking first to the contingent nature of the award, as has already been discussed, the situation here is unlike that in the Serrano cases, where it was uncertain that the attorneys would be entitled to an award of fees even if they prevailed. Government Code section 12965, subdivision (b) created a reasonable expectation that attorney fees would not be limited by the extent of Weeks's recovery and that Weeks's attorneys would receive full compensation for their efforts. The contingent nature of the litigation, therefore, was the risk that Weeks would not prevail. Such a risk is inherent to any contingency fee case and is managed by the decision of the attorney to take the case and the steps taken in pursuing it."*

That language applies with equal force to the facts of this case. *See also Ketchum, supra,* 24 Cal.4th at 1138 ("The trial court is not required to include a fee enhancement to the basic lodestar figure for contingent risk.").

Sufficiently numerous factors support a reduction to the lodestar and weigh strongly against the use of a positive multiplier. Given these factors and the vague time records, overreach, and Block Billing practices of Plaintiff's attorneys, it is far more appropriate for the Court to apply a negative multiplier. Defendant suggests the Court apply a negative multiplier within the order of .20 to reflect each of the above factors and billing practices involved.

VIII. ALTERNATIVELY, THE COURT COULD PERMIT DISCOVERY OR APPOINT AN INDEPENDENT FEE EXPERT AT PLAINTIFF'S EXPENSE

Considering the vague time records, rampant block billing therein, counsel's failure to to have kept contemporaneous time records, and the difficulty in using such poorly kept records to allocate time between his fee and non-fee claims, the Court may wish to allow further investigation of the records.

If the Court intends to grant any motion for attorney fees, Defendant requests discovery to determine the merits of any fee award. *Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 276-77. Discovery may allow the City to better sort through the vague entries, and block billing to ferret out the unrecoverable time spent on the Labor Code claims, or on other poorly considered efforts unnecessarily protracting the litigation which the Court may find should not be recovered.

In *Donahue v. Donahue,* the Court of Appeal held that the trial court on remand should revisit the request to engage in discovery and appoint an attorney fee expert. *Donahue v. Donahue, supra* at 275-276. Given the high dollar amount in fees requested by Plaintiff and the within discussed deficiencies of Plaintiff's supporting documentation of professional services rendered to Plaintiff, the City request that the Court to appoint an independent fee expert, paid for by Plaintiff, to enable the Court to rule on Plaintiff's fee request.

IX. CONCLUSION

The requested rates for each of the attorneys and paralegals should be reduced. Vague entries for phone calls and written correspondence should be reduced by 50%. Block billed entries should also be reduced 50%. Clerical hours, hours spent on pre-litigation work, and fees incurred unnecessarily or on issues protracted by plaintiff's counsel should also be subtracted. All remaining valid hours should be reduced by 33% to allot for the time spent on plaintiff's Labor Code claims, which are not recoverable, and the final tally should reduced by a negative multiplier of .20. These actions should be tallied as shown below:

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	Smith	Brizzolara	Francia	Benedon
Hours Requested	727.6	590.1	118.5	118.5
50% of Vague phone, e-mail, and correspondences entries	-17.3	-46.5		
50% of Block Billed entries	-62.5		-40.6	
Clerical	-15.2		-42.0	
Pre-litigation hrs	-47.1			
Unnecessary Hrs	-40.2	-60.1		-78
Subtotal	**545.3**	**483.6**	**35.9**	**40.0**
33% for Labor Code Claim	-179.9	-159.6	-11.8	0 (-78)
Subtotal	**365.4**	**324.0**	**24.1**	**40**
20% Negative Multiplier	-73.1	64.8	4.8	8
Subtotal	**292.3**	**239.2**	**19.3**	**32.0**
Appropriate Hourly Rate	$500	$500	$150	$500
	$146,150	**$119,600**	**$2,895**	**$16,000**

The Court should award plaintiff, at most, a total of $284,645 in attorneys fees.

DATED: June 25, 2012

BURKE, WILLIAMS & SORENSEN, LLP

By: _____
ROBERT J. TYSON
ATTORNEYS FOR DEFENDANT
CITY OF BURBANK

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 444 South Flower Street, Suite 2400, Los Angeles, California 90071-2953. On June 25, 2012, I served a copy of the within document(s):

DEFENDANT CITY OF BURBANK'S OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY'S FEES; MEMORANDUM OF POINTS AND AUTHORITIES

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☒ by placing the document(s) listed above in a sealed OVERNITE EXPRESS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an OVERNITE EXPRESS agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 25, 2012, at Los Angeles, California.

/s/
Lisa J. Villarroel

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Taylor v. Burbank
LASC, Case No. BC422252

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